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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. 142

JAMES W. OWEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	PAGE
Opinion Below	2
Jurisdiction	2
Specification of Error	2
Questions Presented	2
Statement of Facts	2
Reasons Relied Upon for the Allowance of Writ	24
Conclusion	37

SUMMARY OF ARGUMENT.

I. The Government failed to prove the defendant guilty of the acts charged by the onus of proof required in criminal cases 24

II. A conviction in mail fraud cases must be bottomed on something more than conflicting scientific opinion evidence as to the truth of representations made 29

III. To sustain a conviction for mail fraud, the evidence must prove beyond a reasonable doubt that the defendant knew the representations were false and made them with the intent to defraud. 32

IV. The defendant's good faith offer to make refunds to dissatisfied customers negated any inference of fraudulent intent 33

V. The questions involved raise fundamental rights of far reaching importance to business 36

List of Authorities.

American Tobacco Co. v. U. S., 147 F. 2d 93.....25, 36
Bruce v. U. S., 200 F. 98..... 31
Coleman v. U. S., 167 F. (2d) 837..... 35
Corliss v. U. S., 7 F. (2d) 455..... 32
Epstein v. U. S., 174 F. (2d) 754..... 33
Estep v. U. S., 140 F. (2d) 40..... 33
Harrison v. U. S., 200 F. 662..... 26
McLendon v. U. S., 2 F. (2d) 660, Cir. 6..... 27
Stunz v. U. S., 27 F. (2d) 575..... 31
West v. U. S., 68 F. (2d) 96, Cir. 10.....29, 32
Yusem v. U. S., 8 F. (2d) 6..... 24

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

James W. Owen, Petitioner, prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on the 11th day of April, 1956, affirming the judgment of the United States District Court for the Southern District of Illinois, Southern Division.

The judgment became final on the 9th day of May, 1956, upon the denial of Petitioner's (Appellant below) Petition for Rehearing.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit rendered on the 11th day of April, 1956, affirming the judgment of the United States District Court for Southern Illinois, Southern Division, is not reported, but is attached hereto as Appendix "A".

JURISDICTION.

Jurisdiction of the Supreme Court of the United States is invoked under Title 28 of the United States Code Section 1254 (1).

SPECIFICATION OF ERROR.

The Court of Appeals Erred:—

1. In affirming the judgment of conviction on the sole ground that the "weight and credibility of witnesses" was a question for the trial court, when all material facts were undisputed.

2. In refusing to review the undisputed evidence because its function "*was not to act as a super finding tribunal.*"

3. In permitting a conviction, which was bottomed on a disputed scientific theory, to stand.

4. In totally ignoring the undisputed evidence offered in defense.

5. In refusing to hold that the conviction was predicated solely upon conjecture, surmise and suspicion.

QUESTIONS PRESENTED.

The questions presented are whether or not a merchant is guilty of using the mail to defraud.

1. Where he advertised fruit trees as "dwarfs" and (a) there is no evidence that the trees when mature

would not be *small trees;* (b) where he relied upon the representation of his supplier that the trees were in fact "dwarfs", and (c) where there was a disputed question among scientists as to whether or not the trees sold were "dwarf" trees.

2. Where he advertised violet plants as "red violets", where the term "red violets" was a proper trade designation of the plants sold.

3. Where some of the tulip trees sold were not as tall as advertised and it appeared that some of the trees were broken in transit and where reasonable precautions were taken to see that the trees when shipped were of the size specified in the advertisement.

4. Where he advertised that he would make refunds where customers were dissatisfied and the undisputed evidence shows that he actually issued more than 185,000 refund checks totalling $300,000 during the three year period in question.

STATEMENT OF FACTS.

The brevity of the opinion of the United States Court of Appeals for the Seventh Circuit in this case and the grounds upon which this certiorari is predicated makes an additional statement of fact necessary.

The defendant, James W. Owen was indicted and charged with using the mails to defraud in violation of Section 1351 of Title 18 of U. S. C. The indictment consisted of twenty Counts. He was found guilty by the court on seventeen of these Counts and sentenced to one year imprisonment, and in addition thereto a fine of $1,000 was imposed upon each Count.

The indictment alleges that Owen devised a scheme to obtain money by means of false representations from persons desiring to purchase certain named plants sold by nurseries. Specifically the indictment charged that Owen falsely represented:

1. That he was selling a variety of African Violets

known as "Red Blaze" which would bear rich, red blooms up to three (3) inches wide.

2. That he was selling a collection of three (3) varieties of African Violets, namely: The reddest African Violets known, having giant leaves and giant blooms; (2) the favorite easy blooming China Blue variety known as "Blue Duke" and (3) the new variety "Snow Fall" the blooms of which looked like huge snowflakes.

3. That the early blooming tulip tree sold by him was a strong tree three to five feet tall.

4. That he was selling "dwarf" fruit trees.

5. That he would return the purchase price to customers not satisfied with the merchandise sold.

The indictment alleges that these representations were false, that Owen knew they were false, and that Owen intentionally made them for the purpose of inducing people to send him money for this merchandise.

Each of the twenty counts of the indictment describes a mailing alleged to have been made pursuant to the scheme to defraud.

Undisputed Facts Regarding the Defendant's Business Organization.

The defendant, James W. Owen, operates a nursery business in Bloomington, Illinois. He is forty-nine years old and lived in Bloomington all his life. He entered the business in 1934 and after seven or eight years his business was moved to the present location where there was a small building and a greenhouse. (T. 1843.)

Prior to 1946 Owen's business was limited to local retail sales. In that year, Owen started selling nursery products through mail order, using Everett Biddle, of Bloomington, as his advertising agency. (T. 1673, 1844.) The mail order

business started out slowly but it grew rapidly. Mr. Biddle advised that a different name be used in some advertisements. This suggestion was adopted and beginning in 1951 Owen did business under both his name and his wife's maiden name, Marie Kruse. (T. 1025, 1674.) Subsequently a third account called the Bob Richard's account was added. (T. 1846.) These businesses were conducted entirely separately and the files, the mail and the orders of the three accounts were handled separately. (T. 948.)

By 1952 Biddle was placing advertising for Owen in over nine hundred publications, producing a million dollars worth of business a year. (T. 1673.) Beginning in 1950 the defendant also employed the Myerhoff Agency and his advertising costs increased from $1,906.08 for one advertisement in forty papers in 1950 to $449,288.61 for advertisements in five hundred papers in 1951 and to $1,470,986.87 for advertisements in 882 papers in 1952. (T. 1760.) The business resulting therefrom increased proportionately. (T. 1844.)

The mail order sales which had been less than $50,000 in 1946, by 1952 amounted to more than $3,000,000. (T. 931.) During the busy season the defendant received as many as 17,000 orders in one day. As many as 23,000 packages were shipped on peak days. (T. 1035.) In 1952 the defendant's organization shipped 2,000,000 parcels. (T. 931.)

The mail for the Kruse nursery, Owen's nursery and Bob Richard's nursery were kept separately. The letters are opened by an electric letter-opener, capable of opening more than sixty envelopes a minute. (T. 1010.) The mail was then distributed by the supervisor to the desks of the mail order readers. (T. 950.)

The mail readers opened the mail and sorted it into three piles: the paid orders, the C.O.D. orders and the

correspondence. (T. 1503.) The readers checked the orders as to amount and as to whether the plants ordered were restricted from import into the state. When this had been done, the C.O.D. orders, the cash orders, together with the money received were sent to the cashier's department and the correspondence to the correspondence division. (T. 954, 1504, 1018.)

From the cashier the orders went to the "IBM" department where cards were made showing the name and address of the customer, the product ordered and initial of the IBM operator. (T. 955.) The cards and the orders were then sent to the verifying department where the customer's order was compared with the information on the "IBM" card to check for errors. If the IBM cards were punched wrong and the error was not caught, the customer would not receive the article ordered. (T. 701.)

From the IBM card a tabulation sheet was prepared. (T. 955.) In the tabulation room both the shipping labels and the acknowledgment labels were made up. (T. 960.) The shipping labels were given to the custodian of the vault in the IBM room who held them for delivery to the supervisor of the shipping room. (T. 963.)

During the busy season each supervisor in the shipping room would have up to twenty-five girls working under her. (T. 1601.) As many as 23,000 packages were shipped daily. (T. 1600.) One packer could process three hundred or more packages a day. (T. 1565.)

They fill the orders by referring to a code sheet which lists the names and the code numbers of all the merchandise sold. (T. 1569.) Posted on the bulletin board in the shipping room were advertisements of the products being shipped. It was the duty of the supervisor to call the girls' attention to the descriptions in the advertisements so that shipments would conform. (T. 1572.) There was a 36" measure marked off on the desk of each girl in the ship-

ping room so that the girl could determine the size of the plant being shipped and see that it conformed to the advertised specifications. (T. 1572.) The girls in the shipping room were instructed to label every tree shipped with a wooden label or a small gummed paper label (T. 1609) and to put a planting instruction sheet and guarantee in each package. The African Violets came to the nursery already labeled by the grower. (T. 1611, 1622.)

The correspondence department handled all of the nursery correspondence except orders, including complaints. (T. 1629.)

Because of the volume of mail mimeographed forms were used in answering correspondence. On these slips the girls were instructed to write additional information appropriate to the individal case. (T. 1633.)

Every communication was answered. A letter received from a customer was mailed back to him with the answer and a form letter answer requested the customer to return all of the correspondence to the nursery if further letters were written. (T. 1641.) The nursery kept no record or file on the complaints. (T. 737.) The procedure of returning the complaint to the customer with the answer is a general practice of the mail order business. (T. 1312.)

The Government's Evidence to Support the Charge That the Defendant Would Not Refund Money to Dissatisfied Customers as Guaranteed.

Of the 49 customers who testified in this case 34 of them notified the nursery of their dissatisfaction; 13 of the 34 received refunds. An additional 2 customers received replacements for the merchandise complained of and 3 were given one-half credit for their purchases.

The Government's Evidence to Support the Charge That Owen Was Not Selling Dwarf Fruit Trees Which Would Bear Fruit Within One Year.

John Kelly (T. 433) testified that he was the general manager of Kelly Brothers Nurseries, Inc.; that he had received a degree in agriculture from Cornell University. His company carries on a mail order business. In October of 1952, he had his secretary purchase some nursery stock advertised by Owen as Dwarf Fruit trees. He testified that the merchandise received included no Dwarf trees. On direct examination, Mr. Kelly was asked:

> "Q. In the nursery trade, what is a dwarf fruit tree?
>
> A. It is a tree that has been budded on a special type of root stock to make a dwarf growth, or a tree. A particular scion is used and the tree grown from using the special scion on the root stock."

He was further asked:

> "Q. What is the purpose of budding or grafting?
>
> A. As a general rule no seedling planted will come true from seed. You take a bushel of peach pits, if they were Elberta peaches they would not all be Elbertas, a hundred or more varieties. Seed from a Delicious Apple might have some red, green, yellow—it would take a number of years for it to fruit for you to know what you did have.
>
> Q. By grafting you can produce a known fruit on that tree?
>
> A. Yes, sir."

On cross-examination the witness testified that since the purchase of the trees in 1952 there had not been sufficient time for him to ascertain whether these trees would develop into fruit-bearing trees of a small size. (T. 449.) The witness testified that he made the purchase because it was being advertised by a competitor. (T. 448.) His whole and first purpose after receiving the first package was to see

that the postal authorities were informed of the situation as he saw it. (T. 449.)

Charles E. Pratt (T. 477), a Professor Emeritus from Teachers' College of Connecticut, testified that in May of 1953 he purchased from the Marie Kruse Nursery, through mail order, ten trees advertised as "dwarf fruit trees." Professor Pratt was asked on direct examination:

> "Q. Did you examine to determine if they were dwarf fruit trees within the botanical area?
>
> A. Well, you could about tell whether it was a dwarf one or not. The only thing you could tell was whether or not it was. It couldn't be a dwarf tree unless it was a graft and here are grafts so there was a possible chance they might be dwarf trees." (T. 481.)

John R. Magness (T. 498), testified that he was the head horticulturist in charge of the section in the Department of Agriculture that handles research of fruits and nuts. He attended the Oregon State College where he received a Bachelor of Science degree and a Master of Science degree in horticulture. He attended the University of Chicago, receiving there a Doctorate in Botany. Testifying as a government witness, he was asked on direct examination:

> "Q. How would you define the term "dwarf" fruit tree?
>
> A. A dwarfed fruit tree is one that is smaller, significantly smaller than the regular type tree of the particular kind of fruit that you are dealing with." (T. 500.)

The doctor was further asked:

> "Q. Are there more than one method of producing dwarfed trees, dwarfed fruit trees?
>
> A. Yes, there are, I would say: two or three distinct methods.
>
> Q. Would you state what they are?

A. The oldest method has been to graft or to bud the desired variety on a root which would restrict its growth.

Q. By that you mean—

A. The second method which has come into vogue somewhere in recent years has been to work in a section of stem from the dwarfing type between the root and the bearing top of the desired variety * * *"

The witness continued:

"And the third which is perhaps not a matter of producing dwarfs, but a—that should be mentioned in this category, we have certain types of fruits that are naturally smaller growing, and if they are worked on an ordinary root stock, they will still give you a smaller stature tree. Of course, on any ordinary fruit stock, they are—they will give you a smaller stature tree * * *." (T. 502.)

The Court directed these questions to Dr. Magness:

"The Court: I wonder if you would distinguish more between your No. 1 process and the No. 3 process? The difference between dwarf trees, I don't understand it thoroughly.

The Witness: Perhaps I misspoke in calling the No. 3 process, which I referred to there is that you may have, we do have certain types of fruit that are poor growers, that do not make as big a tree, and if you plant those around or graft them onto other types of roots, they still make a smaller tree and those trees at times have been referred to as dwarfs. They are really natural dwarfs rather than artificially made dwarfs.

The Court: The No. 3 process, if you want to call it such, does not necessarily involve any grafting process; is that right?

The Witness: Not necessarily, unless you want to be sure of the variety that you have. If you want a specific variety that must be done. If you just want a general kind, it would have to be grafted.

The Court: Then it is correct to say that any small tree of the class you are discussing now might be properly called the dwarfed tree?

The Witness: If a tree is small, as compared to the standard variety, if it is small, I think it would not be inaccurate to call it 'dwarf'."

The dwarf fruit trees secured in the test purchases were delivered by Inspector Callahan to Dr. Magness. (T. 497.)

The doctor opened these packages when Mr. Callahan brought them to him and examined each one. While on the witness stand, he examined the trees contained in Government's Exhibit No. 5 as to a tree which was labelled "plum", and was asked:

"Q. Was it in your opinion a plum?

A. Yes, sir.

Q. Could you tell the variety or kind of plum that it would produce?

A. No, sir.

Q. Was it in your opinion a dwarf plum?

A. There had been no treatment of any kind to make the plant a dwarf. I could not tell what the ultimate stature of the tree would be, but there had been no treatment to dwarf it.

Q. Would it have been, had it been planted and grown, substantially the same height as all other plum trees of the same kind? Can you answer that?

A. Yes, it would be, depending on the conditions of growth, the normal size of tree of the particular kind of plum that it was."

Dr. Magness stated that the tree was not of bearing size (T. 515), that the tree could be transplanted successfully, but he would not say that it was the best size for transplanting. (T. 516.) The over-all length of the trees in the shipment was from 20" to 36". (T. 517.) Dr. Magness gave similar testimony regarding an apple tree, a cherry tree, and a pear tree, included in the shipment. He testified that all of the packages delivered to him by Inspector

Callahan were substantially similar to the Government's Exhibit No. 5. (T. 527.)

On cross-examination, Dr. Magness was asked:

> "Q. In fact, dwarfing may be brought about by pruning, if it is intelligently and properly done, may it not?
>
> A. The size of the tree can be kept down by pruning.
>
> Q. Well, it is all ostensibly a process of dwarfing a tree at that time, isn't it, if it is smaller than the normal one, or type?
>
> A. It depends, of course, on your definition of dwarfing; they can, yes, but you can keep a tree down to a restricted size simply by pruning.
>
> Of course, you can also do it by growing it in a restricted area of soil, using a standard root, or putting it in a pot and making it pot-bound. You can keep your tree down and you can speak of that as a dwarf tree, yes, sir." (T. 533.)

It was Dr. Magness' belief that if a seed were planted from a tree which had been dwarfed by grafting, the plant resulting from the seed would not be of dwarf size, but would rather be of normal size. (T. 534.)

Dr. Magness was asked:

> "Q. Do you know that the United States Government has sent Dr. Hanson upon three occasions through Russia and Siberia for the purpose of producing a hardy fruit tree among other things?
>
> A. Yes, sir.
>
> Q. And the Russians do say that they produce in just such a manner as I have said to you trees that are smaller in type using the seeds from original dwarfs in the manner that I have explained to you, do they not?
>
> A. You are touching on one of the most controversial questions in the art of genetics, Mr. Attorney * * *."

Dr. Magness stated that the seedling tree which had been shipped by the Owen nursery had not been budded or grafted, and therefore, he would expect these trees to develop approximately as the basic nature of the parent would determine. He was asked:

"Q. So that if these root structures would have come from one of the dwarfing trees of Hanson, you would expect it to be of the same general type as those Hanson trees, whether they were budded or grafted or were seedlings, would you not?

A. I would expect these trees to be in general, similar to the parent type from which they came." (T. 536.)

The Doctor was further asked:

"Q. Is there any way, Dr. Magness, from a seedling, to tell just what experimenting has been made of its ancestors?

A. No, * * *." (T. 539.)

Upon redirect examination, Dr. Magness' attention was directed to the Government's Exhibit No. 14, which contains an advertisement of the Hanson anocha apple. The tree is described in the advertisement as follows: "Hanson's anocha apple low-bushed trees grow only one-half regular size, yet produce large numbers of apples, cold resistant, enjoy abundant fruit from these low bushy trees, five good trees for $3.00." The Doctor testified that the anocha apple is small in size for an apple and early bearing. The Doctor was asked:

"Q. Now, from your understanding of the subject, to what would the 'regular size' refer, the regular size of what, of anocha trees or trees generally?

A. No, I would say he means one-half the size of apple trees generally.

Q. Of apple trees generally?

A. Yes." (T. 541.)

It was the opinion of Dr. Magness that the plants that

would come from the seed of the anocha tree, the chances are, would be small in stature. They would partake of the general characteristics of the anocha apple, but they would not be identical with it, and many of them would not be closely similar to it. It would, therefore, be improper to call them anocha apple trees unless they were propagated by budding from the anocha apple tree. (T. 541.)

Again, referring to defendant's Exhibit No. 14, the witness read the advertisement for dwarf plums, "red, flushed dwarf plum, grows three to four feet tall, fruit a deep red, deliciously sweet, a cross between a plum and the Hanson bush cherry, the 'not genuine without a Carl A. Hanson label,' One Dollar." Dr. Hanson stated that the use of the word "cross" indicates that cross-pollenization between the cherry and the plum had taken place and produced a seed. The plant resulting from the seed would be a cross between the cherry and that particular plum. He was asked:

> "Q. In your opinion, would the use of the term 'dwarf' with respect to that progeny be correct?
>
> A. It is a use that has appeared quite frequently. If this description is right, he says it grows three to four feet tall, as compared to standard plums, most of our plum varieties, it would be a dwarf."

Dr. James McCrory was called as a rebuttal witness by the Government. (T. 1947.) He testified that he is the head of the Department of Horticulture and Botany at the South Dakota State College. He was closely associated with Dr. Niles Hansen, who was then Professor Emeritus of Horticulture at the same institution. Over objection, Dr. McCrory was permitted to testify that the varieties of fruit experimented upon and developed by Dr. Hansen were of no commercial value, with the possible exception of some of the plums. (T. 1954.)

Dr. McCrory was asked by Government counsel if he

knew of any process that was instituted by Dr. Hansen which produced a dwarf fruit tree other than by grafting or budding methods. The witness replied:

> "I think it would be desirable to say that the term, 'dwarf,' is sometimes misused. We do not apply the term 'dwarf' to a plant because it is small in stature at all stages.
>
> "There are within certain of these introduced plants that are smaller than others, that is practically true of the Siberian orchard. Dr. Hansen did talk with me frequently about that. Some of those plants in our foundation, plantings that are smaller than others, but we do not define it as dwarf, with one exception. We have them that we are experimenting with, plants that are smaller, and are grown that way by selection. You could term those 'dwarf', but that is an experiment, and they don't leave the station, you know." (T. 1955.)

Upon examination of Government's Exhibit No. 25B, the witness stated that with the exception of one of the plants the group contained no grafted seedling. It was his opinion that the sand cherry was of bearing age and that the rest of the seedling were not. (T. 1958.)

The Government's Evidence to Support the Charge That the Defendant Falsely Represented That He Was Selling African Violets Known as "Red Blaze" Which Would Bear Rich, Red Blooms Up to Three Inches Wide.

Dorothy M. Johnson (T. 361) testified that she ordered two Red African Violets from the Marie Kruse Nursery. She believed she saw an advertisement in a magazine for these violets. The advertisement was not produced in evidence. The witness testified that "it said 'red african violets'." (T. 363.)

After receiving the violets Miss Johnson complained to the nursery regarding the violets, stating "Now they are blooming and definitely aren't red, they are orchid."

L. C. Cornwall (T. 593) testified that he paid the Marie Kruse Nursery $1.75 for two Red African Violets. In his testimony, he was confused as to whether he had made this purchase pursuant to an advertisement which said "Giant Red African Violet Vine," or from an advertisement which merely said "Giant Red African Violet." (T. 598.) He testified that when the plants bloomed their color was sky-blue.

Mrs. Karen Phelan (T. 668) produced in evidence as Government Exhibit No. 60 the advertisement that she saw. It was for a Giant Red African Violet Vine and not for a Red Blaze African Violet, as charged in the indictment. She stated that the Red African Violet Vine is properly called an "episcia," and is not a violet. (T. 672.) She stated that she knew this when she ordered a Giant Red African Violet Vine. She stated that the episcia has a brilliant red hue. (T. 673.)

Mrs. Mary McWhinney (T. 136) testified that she could not state where she saw the advertisement, but that she sent an order to the Marie Kruse Nursery in 1951. She received an African violet which died.

The Government's Evidence to Support the Charge That The Defendant Falsely Represented That He Was Selling a Collection of Three Varieties of African Violets; Namely, the "Reddest Violets Known," Blue Duke, and Snowfall.

Mrs. Anna Dimick (T. 303) testified that she ordered from the Marie Kruse Nursery three African violets for $2.00. She received the three violets in a "squashed" box, two of the plants died. There was no evidence as to their color or variety of any of the three.

Caroline C. Hoffman (T. 472) did not have the advertisement from which she placed her order, but testified that she

ordered Red African Violets from the Marie Kruse Nursery for $1.75. The box in which the violets came contained a slip of paper stating that these violets are crimson in color but are registered with the American Violet Association as "red." She later complained to the nursery when the plants bloomed, as they were purple, not red. She received a refund of the total money paid. (T. 474.)

Mae Nutty (T. 683) testified that she ordered three violets for $1.00. There was no evidence as to the color or variety of the violets delivered.

George W. Leka (T. 798) testified that he bought an assortment of plants from the nursery, including African violets. He testified that the plants did fairly well. There was no evidence as to the kind of violets purchased. The same is true of the testimony of the witness Margaret Dale. (T. 802.)

The Government's Evidence to Support the Charge That the Early-Blooming Tulip Tree Not Sold by the Defendant Was a Strong Tree, 3 to 5 Feet Tall.

John M. Morgan (T. 105), testified that he ordered three tulip trees and one red twig dogwood. He testified that the twigs he received were broken. They were approximately fourteen inches long. He received a credit memorandum for one-half of the purchase price when he complained.

Henry H. Jenner (T. 183), testified that he ordered an assortment of trees, including tulip trees, and that the trees delivered were dead. There was no testimony given which specifically related to the size or condition of the tulip trees received. The negotiations of this witness regarding his refund are set forth in a foregoing paragraph. (T. 183.)

Louis J. Haas (T. 215), paid $2.00 for a Smoke tree,

a Persian Lilac and a Tulip tree. Two of the three trees lived and Haas got a refund for the one that died. The witness does not show which one of the trees died; he testified that the plants received were utterly inferior, but gave no testimony regarding the size or condition of the tulip tree received.

Simon Minchen (T. 263), of Houston, Texas, testified that he ordered three tulip trees and received a package of trees which was introduced into evidence as Government's Exhibit No. 10A3. There was no testimony relating specifically to the size or condition of the tulip tree. Mr. Minchen never wrote to the Kruse Nursery regarding the package which he received.

James W. Burkhart (T. 275), testified that the Tulip tree he received from the Marie Kruse Nursery came in an envelope about eighteen inches long. He received a guarantee with the order which said "return merchandise if not satisfied." He sent a letter of complaint to the nursery, but he did not return the trees. (T. 282.)

Vern L. Stocker (T. 545), testified that he ordered three Red Maple trees, three Early-blooming Tulip trees and two Hydrangeas. After he received the trees he wrote a letter to the nursery stating that, "one tulip tree had top broken off and measured ten inches and two measured nineteen inches. Your literature reads, 'We send a strong tree three to five feet tall for successful planting.' The dogwood had a tap root broken and there was only two or three tiny brace roots. The reason I did not send them back is that your guarantee is not worth the paper it is written on."

The company responded with a communication stating, "I am at once asking my shipping room to send you a replacement." They did send a replacement which Stocker testified was in the same condition as the original order. The advertisement from which Mr. Stocker ordered stated,

"Satisfaction Guaranteed." The written guaranty forwarded with the shipment of trees stated:

> "Most of our customers buy from us again year after year. They know that we guarantee 100% satisfaction or money back. If the stock you have received isn't satsifactory in every way, please let us know. Here is what you do. First of all return the merchandise and write us a letter telling us what you ordered and how much you paid. Send along with your letter the label on your parcel post package. These three things are all very important so please don't forget."

The witness testified that he wrote to the company about the second order but did none of the other things necessary to get a refund. (T. 553.)

Frank Cervenka (T. 581), testified that he ordered three Tulip trees from an advertisement appearing in a paper named "Grit." The advertisement was not used in evidence. There was no testimony as to the description of the size of the trees advertised for sale. Cervenka testified that the trees received were dried up. There is no testimony as to their size.

Mrs. Marjorie Rouw (T. 647), testified that the Tulip tree she received in her order was approximately two feet long. Her mother planted the tree and it lived. She gave no testimony as to the condition of the Tulip tree. Mrs. Rouw complained to the newspaper in which the advertisement appeared and the entire purchase price was returned.

Post Office Inspector William F. Callahan identified ten exhibits as Tulip trees secured in test purchases from the Owen nursery (T. 418), and they were received in evidence.

While on the witness stand Inspector Callahan opened Government's Exhibit No. 26B and measured one of the trees in the package and found it to be 24½ to 25 inches long. The witness was asked by Government counsel:

"Q. Now it is apparent that some of the upper stem has been broken away?

A. It appears that a piece has been cut off, yes."

The Inspector testified that he had received the tree in a broken condition. (T. 927.) This exhibit had previously been identified by Howard Lindimore, the Postmaster of Worthington, Ohio, who testified that he bought Exhibit No. 26B from the Owen Nursery, re-wrapped it and sent it to Inspector Callahan. He testified that he did not notice it was broken then. (T. 159.)

THE EVIDENCE FOR THE DEFENDANT.

The Company Policy Regarding Refunds.

The defendant, James W. Owen, testified that the policy of his business has always been to satisfy the customers. "If they wanted their money back, I said we want them satisfied so send them their money, and if they wanted a replacement, we would give them a replacement." (T. 1847.)

Marilyn Novell (T. 1658), and Alice Patterson (T. 1651), who were in charge of the complaints coming from newspapers and Better Business Bureaus and organizations, testified that this policy was followed in handling complaints. They further testified that the same policy government the handling of complaints which came from customers.

Juanita Kindred (T. 1708), who had worked in the complaint department since 1950, testified that refunds were made upon complaint, unless the customer had kept the plant for quite a while before complaining. In such case, a one-half refund was issued.

Similar and supporting testimony was given by other employees in the complaint department: Irene Wolenschleger (T. 1638), Margaret Render (T. 1628), and Otto

L. Winstead (T. 1741), who was in charge of the readers on the Kruse account. Miss Render stated the policy to be:

> "Well, if they gave us any idea at all of what they had ordered, we would give them a refund. If they wanted a replacement, I would have a replacement marked on it and it would be sent out, and if they didn't state what they wanted, we would have to write to them and get more information." (T. 1630.)

The Company Sale of Dwarf Trees.

The defendant bought trees which he called "dwarf" trees from a reputable nursery established in 1922 and operated by a Carl Hanson, who held a Bachelor of Science degree in Agriculture. (T. 1461.) His father, Dr. Neil E. Hanson, was noted for his work in horticulture. These trees were invoiced and sold to the defendant as dwarf trees. (T. 1495.)

Hanson solicited the business of the Owen Nursery. He described to Owen the dwarf trees which he was selling and he showed him the literature which he had concerning them. Hanson told the defendant of the work that his father had done in the development of a system of dwarfing. The defendant testified that he had previously seen the Hanson dwarf cherry listed in many catalogs. (T. 1850.)

The nursery began buying these Hanson dwarf trees in the spring of 1952. (T. 1849.) Carl Hanson, who appeared as a witness, was asked by Government counsel:

> "Q. How did you happen to invoice those trees to Mr. Owen's dwarf trees?
> A. Because that is what they were.
> Q. Who suggested that they be called dwarf trees?
> A. Myself."

The witness testified that the trees were dwarf trees, produced through the cultivation of selected progeny of dwarf trees. (T. 1429.) This selective cultivation was done

through successive generations over a period of years. (T. 1431.)

George H. Mickey (T. 1365), Associate Professor of Biological Science at Northwestern University, testified that this method of selection by plant breeders could produce the characteristics desired to be propagated. A tree that is a genetic dwarf will produce dwarf trees. The witness gave as his definition of a dwarf tree, "one that is smaller than standard size." (T. 1371.)

Dr. Roy H. Roberts (T. 1347), a member of the staff of the University of Wisconsin, engaged there in experimental work, testified:

> "I would look upon a dwarf plant, vegetable or flower or tree, as one that is smaller than the other members of its group at the time of maturity."

He testified that these dwarf trees can be produced through selection, as described by Hanson. (T. 1350.) All dwarf stock was originally obtained in this way. (T. 1354.) He testified that there is no question but that dwarf trees can be produced by the selection method. He further testified:

> "I see no reason to limit a dwarf tree to those that are propagated by grafting." (T. 1350.)

The Sale by the Company of African Violets.

The defendant, John W. Owen, bought African violets from Edwin C. Hunkel (T. 1851); Edwin C. Hunkel advertised the violets as red violets. He testified that there are at least fifty kinds of Red African violets. (T. 1171.) He sold the defendant over a million African violets. (T. 1173.) Hunkel was asked:

> "Q. In the advertising of nursery stock, is the use of the term 'red' in connection with African violets a common usage in the advertising of all nurseries?

A. That would be the only possible way one could identify the red violet."

He testified that he did not know any African violet that produced real bright-red blooms. (T. 1185.) By comparison the violet containing some red is known as red in the florist trade. (T. 1182.) Mr. Hunkel testified that Helen Van Pelt Wilson, in her book on African violets, lists more than fifty violets designated as red. (T. 1178.) Mr. Hunkel was currently producing approximately 475,000 African violets per year and believed that he was one of the largest growers of African violets in the United States. (T. 1178.)

Ernest Oeschlin (T. 1191), a wholesale grower of African violets, identified as "red" the exhibits of African violets produced by Hunkel. He testified that the term "red" as applied to violets is not a fire-cracker red, rather it is a red tinged with purple. (T. 1198.) He testified that he lists red African violets as one of the types he sells. (T. 1194.)

The Sale by the Company of Red African Violet Vines.

The proper botanical name of the Red African Violet Vine is the episcia. (T. 671.) Neal Robinson (T. 1399), sold the episcia to the defendant, Owen. He stated that it has been called a violet by everybody that has grown them. Owen never bought any of this type of plant except the red ones. (T. 1856.) The episcia plants bought by Owen were scarlet red in color. The advertisements which read "bright red African violet vine" referred to the episcia which Owen had for sale. (T. 1855.)

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The Government Failed to Prove the Defendant Guilty by the Onus of Proof Required in a Criminal Case.

It is a fundamental concept of criminal law that a defendant must be proved guilty beyond a reasonable doubt. Fraudulent intent is the gravamen of the offense of using the mails to defraud. A false representation does not amount to fraud unless made with such intent. To convict a defendant of that charge it must be proved beyond a reasonable doubt both that the representations were false and that they were made with fraudulent intent. (*Yusem* v. *U. S.*, 8 F. 2d 9.)

A party is not proven guilty beyond a reasonable doubt unless all reasonable minds would so conclude from the evidence. He is not proven guilty unless there is substantial evidence, of facts which exclude every other hypothesis but that of guilt. It is true that "all of the propositions put forward by defendant for reversing the judgment, concern an alleged failure of the government to prove Owen's guilt beyond a reasonable doubt." It is the defendant's position that one cannot be held guilty beyond a reasonable doubt where the evidence standing uncontroverted raises reasonable inferences of innocence. To hold otherwise would emasculate the fundamental principle under which all defendants are presumed to be innocent.

In an appeal such as this, it was the duty of the appellant to determine if there is substantial evidence to support the verdict. The court seems to rely upon the broad general statement that "the weight and credibility, as well as the demeanor" are matters to be determined by the trial judge. This rule, however, must be qualified and it

cannot be made to apply to a cause where the evidence, as in this case, is uncontradicted.

The court apparently refused to consider the question as to whether there was substantial evidence in the record to support the government's charge that the acts of Owen's employees were done pursuant to an intent to defraud, chargeable to the defendant. For a conviction to stand the inferences which may reasonably be drawn from the evidence as a whole must not only be consistent with guilt, but they must also be inconsistent with every reasonable hypothesis of innocence. *American Tobacco Co. v. U. S.*, 147 F. 2d 93. The uncontroverted evidence when considered in a light most favorable to the government is as consistent with innocence as it is with guilt.

1. The defendant was charged with falsely representing that the fruit trees he sold were dwarfs. The undisputed testimony was that these trees were bought as "dwarfs" from a reputable nurseryman who represented them to have been produced by selective breeding. Government expert witness, John R. Magness, a renowned scientist, could not tell what the ultimate stature of the trees would be. (T. 515.) How then can it be said that the government's evidence proved that defendant's representation of the trees as dwarfs was false or that he knew it to be false?

2. The defendant was charged with falsely representing that he was selling red violets. The undisputed evidence, however, was that defendant's violets were red, and that they were known as "red violets", to the trade.

3. The indictment alleges that defendant's representation that the tulip trees sold by him were three to five feet tall was false. Five government witnesses testified as to the size of the tulip trees they received. All but two admitted that the trees were broken when they were received. The government admits that the defendant bought

and sold thousands of these trees a year. He provided facilities and procedure to insure the mailing of trees of the sizes advertised. In the light of this uncontradicted evidence can it be said that the complaints of the two witnesses proved that the defendant was guilty of willful misrepresentation?

4. The defendant is charged with falsely representing that he would return the purchase price to customers who were not satisfied with the merchandise. Some 16 customers testified that their complaints were not adjusted. On the other hand the defendant placed in evidence 185,000 refund checks issued in three years. The bulk of these were paid long before any investigation or prosecution was begun. A promise to refund made in good faith leaves no room for the conclusion that the maker is scheming to defraud. (*Harrison* v. *U. S.*, 200 F. 2d 662.) A defendant must be acquitted of fraud if the evidence shows he made good faith offers to refund. In the case at bar the defendant's cancelled checks are concrete uncontroverted evidence that defendant in good faith promised refunds, and moreover that he kept his promise.

If all of the available dissatisfied customers of any company were rounded up and each required, as was done in this case, to describe his complaint, it would create a distorted picture of that business. This defendant serviced 17,000 customers a day. Forty-five customers complaining against the defendant were paraded one by one before the trial court. The trial judge saw these witnesses and for weeks listened to their complaints. If their stories were controverted the trial court would perhaps be in a better position to weigh this testimony. That is not the case. The defendant contends that from the welter of testimony showing dissatisfaction no fraud can be inferred. To determine this question this court being somewhat removed from the impact of the tedious recitals—is in a posi-

tion superior to that of the trial court. This court can better evaluate the uncontroverted pieces of evidence and place each in its proper perspective. When this is done it will appear that the dissatisfaction of this comparative handful of defendant's customers is such more consonant with an inference of mistakes in the operations of the business than with a criminal intent to defraud. It will be apparent that none of the charges is supported by evidence of facts which negate a reasonable inference of defendant's innocence.

Viewed in an aspect most favorable to the Government's contention, the evidence falls far short of establishing defendant's guilt. The fact that the defendant failed to properly fill the orders of sixty-eight purchasers, even if true, certainly does not lead to the conclusion that the defendant did not have the items ordered. There were some seventy-five to one hundred girls in defendant's shipping room. (T. 1601.) Each girl shipped as many as 300 packages per day. (T. 1565.) Honest mistake or even carelessness are more reasonable inferences to draw from the fact of non-delivery than the harsh conclusion of criminal guilt as the Government assumes.

The defendant is in a legitimate business. Evidence of more than isolated cases of failure to deliver merchandise is necessary to sustain his conviction. In *McLendon* v. *U. S.*, 2 F. (2d) 660 Cir. 6 the court reversed the mail fraud conviction of a seller of bird dogs, holding, p. 660:

> "Like every other legitimate business, this gives the trader, if he is so inclined, opportunity to defraud one customer after another by misrepresenting the quality of his goods, or by the great variety of expedients occurring to an ingenious scoundrel; but it has never been thought that the 'scheme to defraud' of section 215 of the Criminal Code could be found in the mere succession of diverse swindles, unrelated save as they had a common stage. It is not set out in the indictment or

> claimed in the proofs that McLendon's business was not, in substantial part, legitimate and satisfactory to his customers; and so if the indictment is to be held good, we must find in it allegation of some general fraudulent scheme dominantly characterizing some part of his business."

Similar weakness is found in the Government's contention that the defendant did not intend to and did not make refunds. It is based upon the testimony of a comparative handful of people who, in the operation of the defendant's mushrooming business, allegedly failed to get their refunds. The undisputed facts are that the defendant made many refunds. (T. 1821.)

Although not specifically charged in the indictment, it would seem that the crux of the Government's case is that the trees advertised as dwarf were not in fact dwarf trees; that the violets advertised as red were, in fact, not red; and that some of the trees advertised as sturdy, strong and well-rooted, in fact, were not.

The defendant's evidence shows that he stocked his nursery with red African violets purchased from Edwin C. Hunkel, one of the largest growers of African violets in the United States. (T. 1851.) He bought red African violet vines (episcia coccinias), which were blaze red in color, from Neal Robinson, a reputable grower. (T. 1399.)

Standard quality tulip trees, within the sizes specified in the advertisement were purchased from Henry Boyd, whose family had been in the nursery business since 1887. (T. 1237.)

Dwarf fruit trees were supplied the Owen nursery by Carl Hanson, a well known tree merchant and the son of a developer of dwarfing process. (T. 1428.) He had sold trees to Woolworth, Kresge and Sears-Roebuck. (T. 1441.)

The defendant had advertising agencies prepare adver-

tisements to sell his products. The advertising copy repeated the representations which defendant's suppliers made to him. Expert witnesses testified for the defense that the descriptive terms used in the defendant's advertisements were commonly accepted names for the products sold.

The burden was on the government to prove that the representations in the advertisements were false. In *West v. U. S.* (68 (2d) 96, Cir. 10), the defendant was convicted of using the mails to defraud in connection with the sale of a medical preparation advertised as a syphilis remedy. In reversing the conviction the court said (p. 98):

> "If the compound used and sold by the defendants was a cure or remedy for the ailments as represented by them, then no offense as charged in the indictment was committed by them; and the burden was on the prosecution to prove by substantial evidence it was not a cure or remedy before the court could submit the case to the jury."

The evidence adduced by the government failed to establish the falsity of the representations.

II.

A Conviction in Mail Fraud Cases Must Be Bottomed on Something More Than Conflicting Scientific Opinion Evidence, as to the Truth of the Representations Made.

The Government sought to prove that the trees advertised and sold by the defendant as dwarf trees were not dwarf trees. Experts eminent in the field of horticulture were presented as Government witnesses and testified that the term dwarf tree applied to a tree made shorter by a budding or a grafting process. (T. 481, 502.)

For the defense, equally eminent experts appeared and testified that any tree shorter than normal for its type

was a dwarf tree and that dwarf trees could be produced by selective breeding. (T. 1365, 1350.) Carl Hanson, the grower from whom the defendant obtained his dwarf trees, testified that selective propagation was the method of producing dwarfs he used. (T. 1429.)

The controversy between these experts was summed up by Dr. John R. Magness, the Government's principal expert witness, who testified, "It depends, of course, upon your definition of dwarfing." (T. 533.)

The blaze-red African violet vine sold by the defendant is properly known as an episcia. The grower of the plants, Neal Robinson, testified that almost everyone called the episcia an African violet. (T. 1400.) Technically speaking, however, the red African violet vine or episcia is not the violet but a "cousin of the violet". (T. 1189.)

There was a difference of opinion between the witnesses produced by the Government and those who appeared for the defense as to whether the African violets sold to the defendant by Hunkel could properly be called "red". Hunkel, who appeared as a witness produced samples of the merchandise sold to Owen, which were admitted in evidence as Defendant's Exhibits 89, 90 and 91. (T. 1172.) The blooms of the plants unquestionably contained some red color. (T. 1182, 1192.) There was testimony by Government witness that there is no such thing as a "red" African violet. (T. 671.) The standard literary work on the African violet entitled The Complete Book of African Violets, by Helen Van Pelt Wilson, published by M. Barrows & Company, Inc., has this to say about the color of African violets (p. 193):

> "The color of saintpaulias is a not too constant quality. In fact, it seems to me after we decide saintpaulias have a range from deep, intense purples through blue-violets, wine-red, and pink-violets to pink, blush, and white, that we have about told the color story. To

give each variety a symbol and place it exactly on a finely graded chart is hardly possible or worth while. I have tried this method with several charts and at different seasons. It was a frustrating business. The saintpaulia which today is Red Violet 4, may after a week of cloudy weather be nearer Red Violet 6. The variety which in one soil is blue under more alkaline conditions may be orchid. We must never be arbitrary about color.

"Perhaps it is best to think of color as a relative characteristic—Viking will always be deeper than Blue Eyes, but the degree of variance may not be constant. In view of saintpaulia variability, I have discarded the symbols used in my first book and am describing colors only with words."

The author lists all the names of African violets which have come to her attention. On page 220 of her book are thirty names of violets beginning with the word red running through Red-Amazon, Red Amethyst, Red Beauty, to Red Waves.

No conviction of fraudulent purpose can lawfully be based upon matters merely of opinion. *Bruce* v. *U. S.* (202 Fed. 98); *Stunz* v. *U. S.* (27 F. (2d) 575).

The *Stunz* case, like the case at bar, was a mail fraud case. It involved the sale of a medical preparation. The Court observed that medicine was not an exact science and that the liberty of an accused could not depend solely upon the choice that a jury might make between the conflicting opinions of medical experts. The Court held (p. 579):

> "A conviction in a case such as this must be bottomed on something more than conflicting opinion evidence."

The science of horticulture also lacks exactitude. Certainly there is neither uniformity nor accuracy in the names of horticultural products in the market place, where the popular and scientific names mix. The experts who

testified differed as to whether the defendant, a vendor of horticultural products, picked the appropriate names for his products. The liberty of the defendant cannot be allowed to depend on a choice made between the equally acceptable conflicting scientific opinions.

III.

To Sustain a Conviction for Mail Fraud, the Evidence Must Prove Beyond a Reasonable Doubt That the Defendant Knew the Representations Were False and Made Them With the Intent to Defraud.

This is a criminal case. To sustain a conviction, the Government must prove both that the representations made by the defendant were false and that the defendant made them knowing that they were false. (*Corliss* v. *U. S.*, 7 F. (2d) 455; *West* v. *U. S.*, 68 F. (2d) 96.)

The testimony adduced from the defendant's suppliers and other witnesses refutes the charge that the defendant's description of his merchandise was false. These witnesses testified that the African violets were red, that the episcia is called an African violet, and that the trees sold as dwarfs were dwarfs. There is no showing that the defendant, when he so described his merchandise, had knowledge of opinions to the contrary, such as those expressed by some of the Government's witnesses.

The reasonableness of the defendant's belief in the truth of his descriptions must not be judged on the basis of the wealth of information now before the Court. It must be judged on the information which the defendant had at the time the representations were made.

There is no evidence that the defendant knew that refunds had not been made to the dozen or so witnesses who testified that they did not receive refunds. The thousands of refunds that had been or were being made gave the de-

fendant a solid basis for believing that his advertising regarding refunds was being carried out. (T. 1820.)

The Court in *Estep* v. *U. S.*, 140 F. 2d 40, stated at page 45:

> "Often the line between honest belief and purposeful misrepresentation is fine and indistinct, between the two, however, lies guilt or innocence, and where the evidence is evenly balanced between guilt and innocence, a conviction cannot stand."

The indictment charges that the defendant wilfully designed a scheme to defraud. To establish defendant's guilt of this charge, the Government had the burden of showing beyond a reasonable doubt that the defendant made the false statements alleged with fraudulent intent. (*Yascm* v. *U. S.*, 8 F. (2d) 6.)

The fraud necessary to sustain the conviction must be actual fraud wherein the defendant intentionally practiced deception to get money. The Government failed to prove that James W. Owen purposely committed the crimes charged. (*Epstein* v. *U. S.*, 174 F. (2d) 54.)

IV.

The Defendant's Good Faith Offer to Make Refund to the Dissatisfied Customers Negated Any Inference of Fraudulent Intent.

In the three (3) years prior to July, 1953, the defendant issued between 185,000 and 190,000 refund checks amounting to a total of $313,554.12. (T. 1822.)

The Government charged that the defendant attempted, by the use of printed slips and form letters, to delay making refunds until the dissatisfied customer would abandon his claims. (T. 10.) In an effort to sustain this charge, the Government produced some witnesses who testified to aggravations and delays experienced in attempting to get

refunds from the defendant's company. Undoubtedly such complaints could be secured from a few of the customers of any mail order house doing a mass business.

Sears Roebuck & Company uses substantially the same system as the defendant in handling its complaints. Sears keeps no order file and no file on the complaints received. It requires the customer, when writing about orders, to return the previous correspondence. (T. 1318.) Sears includes in its shipments a request that the customer return the order in case something goes wrong. (T. 1319.) Sears had complaints from thirteen (13) out of every one hundred (100) orders of nursery goods. (T. 1314.) For Owen, the complaints ran only six (6%) per cent. (T. 1873.)

The use of printed slips or letters in correspondence is not uncommon. The fact that in their use the correspondence of some customers got snarled, will not support the conclusion that the slips were used to discourage refunds.

John W. Freimuth, Director of Correspondence for Sears Roebuck & Company, testified as to the inevitability in business of such occurrences:

> "It happens in all businesses and we try to right those things but they happen, cases where two or three times a loyal customer gets kicked around, we don't like it but it happens, and no matter what we do, they are going to complain again. We don't know whether it is the mailing department or what department causes it, but it happens that a customer will get kicked around and will complain." (T. 1322.)

The 185,000 cancelled refund checks (T. 1850) stand as immutable evidence of the good faith of the defendant not only in making but also in executing his guarantee. The good faith making of the promises to refund standing alone leaves no room for the conclusion that the defendant schemed to defraud.

The defendant's business in recent years had grown phe-

nomenally. In 1952 he was doing an annual business of three million ($3,000,000.00) dollars. (T. 931.) He handled over one hundred sixty (160) items. (T. 1867.) The sales of the articles complained of — the dwarf trees and the violets — represented only eight (8%) per cent of the defendant's business. (T. 1768, 1766.) Against this background the contention that the representations regarding the violets and the dwarfed trees were made with an intent to deceive or cheat is utterly lacking in persuasion. Every reason existed for desiring customer-satisfaction. A large portion of the company's income came from the returns from catalogs that were mailed to former purchasers. (T. 1863.) Failure to achieve this satisfaction can be laid to nothing more than carelessness. Under such circumstances, the defendant must be found "not guilty." *Coleman* v. *U. S.*, 167 F. (2d) 837.

It is charged in the indictment that the defendant fraudulently represented that he was selling tulip trees three to five feet tall. Post Office Inspector Callahan while on the witness stand opened a package of tulip trees secured from the defendant in a test purchase. He removed from the package a tree which was broken and less than three feet long. Apparently it had been broken after delivery because the postmaster who received it and sent it to Callahan testified he did not see any evidence of breakage. However, other witnesses who received trees testified that the trees were broken when received. This accounts for their conditions when received and fails to support the contention that they were short of the specification when shipped.

Government witnesses testified that the defendant was careless in packing his shipments. There was testimony that in shipping proper care was not taken to protect the plants and keep them moist.

None of this evidence, even if entirely true, will support the claim of intentional fraud.

Fraud and carelessness are incompatible terms. One implies an intent; the other a lack of it. They are as unmixable as water and oil. Intent is not proved where the action may be explained on the grounds of carelessness.

V.

The Decision Involves Fundamental Rights of Far Reaching Importance.

If this decision is permitted to stand persons engaged in the advertising business will be subject to prosecution and conviction under this Statute where the intent to defraud is clearly negated by undisputed evidence. The fundamental principles that when there are equal inference arising from undisputed facts, one of which is consistent with guilt, while the other supports a reasonable hypothesis of innocence, a conviction cannot stand. Under such circumstances it cannot be said that the prosecution maintained the onus of proof which requires *proof beyond a reasonable doubt.* (*American Tobacco Co.* v. *U. S.*, 147 F. 2d 93.)

Aside from the injustice of the conviction in this case the precedent set will place an unwarranted hardship upon the mercantile industry. No merchant can possibly know all the facts concerning the merchandise he advertises and sells. He must rely upon the representations of the responsible supplier from whom he purchases.

It is the duty of an Appellate Court to review the facts and so doing does turn it into "*a super fact finding tribunal.*"

No one should be deprived of his liberty upon surmise, conjecture and suspicion.

CONCLUSION.

For the reasons herein expressed it is respectfully sub-
tted and it is urged that the writ of certiorari should be
anted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.

No. 11329. OCTOBER TERM, 1955, JANUARY SESSION, 1956.

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
vs.
JAMES W. OWEN, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

April 11, 1956.

Before FINNEGAN, LINDLEY and SCHNACKENBERG, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Having waived a jury, defendant Owen proceeded to trial, before the district judge, on a twenty count indictment grounded on 18 U. S. C. § 1341.[1] Owen was found guilty on seventeen counts and the remaining three counts were dismissed on the government's motion. Defense motions for a new trial, or in the

1. § 1341. "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

alternative, for a judgment of not guilty notwithstanding the district judge's findings were denied. Owen was sentenced to jail for a period of one year, and fined $1,000 upon each of the seventeen counts in the indictment. All of the propositions put forward by defendant for reversing the judgment, concern an alleged failure of the government to prove Owen's guilt beyond a reasonable doubt. Splinters of the same contention are presented in various guises, and are facets of the same theme, but this judgment of conviction must be affirmed. "If a man intentionally adopts certain conduct in certain circumstances known to him," Mr. Justice Holmes long ago wrote, "and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent." *Ellis* v. *United States*, 206 U. S. 246, 257 (1907). Thus while the government has the burden of proving Owen's intention to defraud under § 1341, as well as the other relevant elements of this statutory offense, the requisite state of mind is ascertained from the evidence introduced below. Section 1341 is a broad proscription of behavior for the purposes of protecting society. See e. g. *Silverman* v. *United States*, 213 F. 2d 405, 406 (5th Cir. 1954); *United States* v. *Sylvanus*, 192 F. 2d 96, 106 (7th Cir. 1951). Consonant with that section, the indictment charges Owen with operating a scheme to defraud by use of the mail, as a part of which Owen is alleged to have made some nineteen specific false representations, promises and pretenses concerning three specific products and two others referring to the character of the general products sold by him and value thereof coupled with a scheme and device to impede dissatisfied customers from pressing their claims.

Shortly stated, Owen engaged in a widely circulated advertised mail order business through which he offered a variety of African Violets, dwarf trees, and tulip trees.

He is charged with making false representations as to those items and holding out, in his advertisements a customers' guarantee, but the manner in which he responded on that guarantee constituted a device to defraud in connection with the sale of his products. In addition, this indictment charged that Owen intentionally adopted delaying tactics in order to discourage customers from making extended efforts to obtain satisfaction and fair treatment; that the merchandise sold by Owen was of an inferior character and his prices were in excess of the market value of such merchandise, though it was generally described as being of a very high type at prices far below the general market price. There is a voluminous record before us of 1988 pages of testimony and a welter of documentary evidence consisting of advertisements and correspondence by and between myriad customers and Owen's representatives, whom he employed in his businesses variously entitled "Owen Nursery," "Marie Kruse Nursery" and "Bob Richards Nursery." The weight and credibility, as well as the demeanor of the approximately 135 witnesses (customers, postal-inspectors, horticulturists, including the defendant himself) are all matters solely within the trial judge's range, inhering in his final judgment. We are satisfied that the district judge correctly disposed of the defense motions interposed below. *United States* v. *Thayer*, 209 F. 2d 534 (7th Cir. 1954).

"The Government," Mr. Justice Clark declared, when delivering the majority opinion in *Holland* v. *United States*, 348 U. S. 121, 138 (1954), "must . . . prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty." Since the district judge decided the total issues below, it is unnecessary for us to explain the concept of reasonable doubt. We think his ultimate view of the integrated evidentiary strands woven throughout the case should remain undisturbed.

We are aware, as already noted, that the trial judge received both oral and documentary evidence. But Rule 23(c), Federal Rules of Criminal Procedure, 18 U. S. C. A., was not invoked, under which there might have been a request for finding the facts specially. Thus in appeals of this type, where the merits are heard and tried below without a jury, we do not function as a super-fact-finding tribunal. If the record, as here, discloses substantial evidence [*United States* v. *Aman*, 210 F. 2d 344 (7th Cir. 1954)] supporting the judgment appealed, that ends the matter barring, of course, any other technical points which might be raised.

The judgment of the district court is affirmed.

AFFIRMED.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statute involved	2
Statement	2
Argument	16
Conclusion	19

CITATIONS

Cases:	
Delaney v. *United States*, 263 U. S. 586	19
United States v. *Johnson*, 319 U. S. 503	19
Statutes:	
18 U. S. C. 1341	2

390811—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 142

JAMES W. OWEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 39–42; R. 2019–2022) is reported at 231 F. 2d 831.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1956 (R. 2022), and a petition for rehearing was denied on May 9, 1956 (R. 2023). The petition for a writ of certiorari was filed on June 7, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the evidence is sufficient to support petitioner's conviction for mail fraud.

STATUTE INVOLVED

18 U. S. C. 1341 provides:[1]

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

Following a waiver of trial by jury (R. 68), petitioner was convicted of a scheme to defraud by the use of the mails, in violation of 18 U. S. C. 1341 (R. 4–26,

[1] The indictment alleges violations from July 1950 up to the return of the indictment in July 1953. The statute quoted in the text is from the 1952 edition of United States Code, but it is the same as the statute which appeared in the 1946 edition (Supp. V), which is applicable to the pre-1952 violations.

2002).[2] He was sentenced to imprisonment for a term of one year and to pay a total fine of $17,000, $1,000 for each count under which he was convicted (R. 2004). On appeal, the judgment of conviction was affirmed (R. 2022).

The indictment charged petitioner with misrepresenting the nature of dwarf fruit trees, African violets, and tulip trees which he sold by mail, the character of his general merchandise, and with impeding his dissatisfied customers from pressing their claims for refunds (R. 4–26). The evidence may be summarized as follows:

General background. Petitioner, who had an educational and practical background in nursery and horticultural work, started a retail nursery in 1934 in Bloomington, Illinois (R. 1842–1843), and began his mail order nursery business with extensive advertising in 1946 (R. 1673, 1844). Originally, the business was operated and advertised solely under petitioner's name, but in 1951 he also used the name of "Marie Kruse Nursery" and, in 1952, the additional name of "Bob Richards Nursery" (R. 946–947, 1673, 1845). The same building, the same employees, the same inventories and almost identical advertising and catalogues were used for all operations (R. 946–947, 948–956, 1567–1570, 1674, 1684, 1838–1839). In dealings with the public, however, there was an attempt to create an impression of separateness (see R. 733, 1839). For example, although the complaints, ad-

[2] Petitioner was found guilty on 17 counts under the twenty-count indictment. On the government's motion, three counts were stricken by the court (R. 4–26, 936, 2002, 2004).

dressed to the three different business names, were in charge of the same employee, she used three different names in replying (R. 735–736). For the "Bob Richards" name, a different post office was used, although the address of the business operations continued to be the same (see R. 1846, 1933). The use of a new name in the operation of petitioner's business was usually followed by an increase in the amount of advertising, particularly in the new name, and these changes resulted in a substantial increase in business (R. 930–931, 1760, 1844).[3]

The volume of business increased to $3,250,000 in 1952 (R. 931). During this period, complaints from customers concerning the inferior quality and misrepresentation of the merchandise, inadequate packing, substitution of merchandise, and petitioner's failure to make full refunds and replacements, began to pour in to his office, the newspapers which were carrying his advertisements, post offices, local chambers of commerce, Better Business Bureaus, and various state agriculture and horticulture departments (R. 105–109, 121–125, 145–147, 181, 183–189, 199–204, 208–212, 263–265, 275–278, 361–364, 373–376, 417, 423–428, 674–676, 735–736, 749, 790–792, 806–809, 813–816, 822–826, 1271, 1783).

Dwarf fruit trees. Early in 1952, petitioner advertised, on a large scale, the sale of dwarf fruit trees. The following advertisement is typical (Gov. Ex. 37–a):

[3] Petitioner's advertising agent testified that the name was changed when the "saturation point" had been reached in advertising under the old name (R. 1682).

Your chance to have a whole orchard in your yard for a few dollars. Amazing dwarf fruit tree sale; easy to grow; usually bear first year; cut food bills fast; make you money, too; no yard too small; no other fruit ever tastes so good as the fresh picked kind, and you will love the sweet, juicy, distinctive flavor of all of these early bearing trees.

You will have fruit for pies, jams, jellies * * * in a few years you will have a big enough yield to sell the surplus at a good profit. Heavy bearing dwarf cherry, $2.00; New red giant dwarf apple, $2.00; Golden Harvest dwarf pear, $2.00; Free Stone dwarf apricot, $2.00; Early bearing dwarf plum, $2.00.

* * * * *

the best of all dwarf cherries because it bears early and produces real jumbo crops. You get hardy, heavy rooted trees, already bearing size, etc.; many regular size apple trees do not bear as big crops of juicy, red skinned apples as these mighty midgets. We send sturdy, well rooted bearing size trees, two to four feet; the pear thrives almost anywhere, heavy bearing, strong, well rooted size trees.

* * * * *

Government experts examined fruit trees purchased from petitioner in response to the advertisements in question (R. 98–103, 511, 615). Some of the trees were planted in a college experimental station and examined after a five-month growth (R. 615–617). The experts testified that upon receipt the trees had practically no moss around the roots and the packaging was such that the trees were bound

to dry out during transit (R. 512, 524, 616). They identified the trees received as fruit trees which were grown one season from seeds and which bore no evidence of any grafting or budding, as not being of fruit bearing size, and as not being "heavily rooted," but as having average roots for one year seedlings (R. 513–515, 517–518, 520–521, 524, 525, 615, 619–620, 623, 628–629). Expert Dr. Magness stated that the seedlings would grow to normal statures, but would not be likely to develop fruit of any known variety since the development of a known variety of fruit requires budding (R. 518–519, 520, 525).[4] He also said that such seedlings would develop fruit only after several years of growth (R. 519, 524).

Government experts described a dwarf fruit tree as one "significantly smaller" than the regular variety (R. 500, 609, 612). True dwarfing is artificially produced by grafting or other methods (R. 501, 612–613). One government expert testified that there are naturally small growing types which could, not inaccurately, be described as dwarf (R. 501–503). One of petitioner's advertisements for dwarf apricots spoke of the "wonders of the tree-grafting art" (Ex. 1; R. 294).

As shown below, petitioner's defense was that the trees he sold were purchased from Carl Hansen,[5] son

[4] In order to obtain a tree which will bear fruit of a specific and known variety, grafting is always necessary. Otherwise, it is impossible to predict or control the quality or variety of fruit that a tree will bear.

[5] Throughout this brief, except where we are quoting we spell the name as "Hansen," although in the record it is spelled inconsistently as "Hansen" and "Hanson."

of the late Dr. N. Hansen (R. 539), who allegedly developed dwarf fruit trees which required no grafting. The experts placed the Hansen bush cherry as a naturally small growing tree (R. 502, 503), but did not know of any standard apple [exclusive of crab apple], plum, apricot, or peach as being of dwarf stature, except through artificial methods (R. 502, 503–504, 508). Dr. Magness further testified that Dr. Hansen's experiments were principally concerned with developing hardy trees which would grow in cold climates and that, generally speaking, such trees were smaller and bore fruit earlier, but that he did not know whether the climate was the cause or effect of such a situation (R. 538). Dr. Tukey described the Hansen cherry tree as an ornamental plant, the fruit of which was useful for game birds (R. 643). He said that he did not believe such a tree was ever used commercially for fruit (R. 644).

Defense expert Carl A. Hansen had been engaged in the nursery business since 1922 (R. 1421). He testified on direct examination that he grew apple, plum, cherry, apricot, peach and pear dwarf trees, invoiced them as such and sold them to petitioner beginning in 1952 (R. 1421, 1427). He said that the dwarf trees which he sold to petitioner were seedlings which were developed over a period of thirty to fifty years by the process of selection as to size and which did not require grafting or budding (R. 1429–1431, 1435–1439). He particularly mentioned the Hansen bush cherry for which his nursery was noted and which he said was a dwarf fruit tree

which was produced from a seedling only, and which produced edible cherries (R. 1437–1438).

On cross-examination, Mr. Hansen agreed that, in order to produce dwarf trees by the process of selection, it would be necessary "to cull out from hundreds of thousands of plants", and in the case of the Hansen cherry, his father in one year had to "cull out something like three million plants" (R. 1480). He said that he had engaged in considerable experimentation in dwarf trees, but had made no records or reports of any of these experiments (R. 1492–1494). He indicated that he had only about 20 to 25 acres of land under cultivation, and was unable, because he did not keep records, to say how many trees he produced, and how much of the acreage was devoted to growing the trees which he sold to petitioner. Later, he said that he purchased about two thirds of the merchandise which he sold to petitioner from other nurseries, but did not so advise petitioner (R. 1465–1467, 1519, 1520, 1525).

Although on direct examination Mr. Hansen indicated that he sold his dwarf fruit trees to many large department stores such as Macy's and Marshall Field (R. 1431–1432), on cross-examination he said that he had not sold fruit trees to these companies since about 1942 (R. 1489), and those he sold he invoiced, not as dwarf trees, but as trees "low in stature" or "dwarf in height". These buyers advertised them as the Hansen line which has a well-defined meaning in the nursery field (R. 1494–1495). He said that he invoiced the Hansen cherry as "dwarf trees" to petitioner, and at the same time invoiced them as

"Hansen bush cherry" to his other customers (R. 1495, 1498). He agreed that the Hansen bush cherry, and the ungrafted apple, apricot, pear and plum seedlings which he sold to petitioner, were generally not raised and sold commercially for fruit (R. 1528).

Hansen stated that when he first began his dealings with petitioner he gave petitioner his catalogues (R. 1495, 1519) which described his products as the Hansen line developed by his father and listed a great many of the trees as ornamental (R. 1493–1495). He said that he was the one who suggested that they be invoiced to petitioner as dwarf trees (R. 1495). Mr. Hansen agreed that in his writings his father "sometimes" and only "infrequently" described his own line as "dwarf stature trees," *i. e.* trees which were naturally low, that his father made no claim to producing dwarf fruit trees (R. 1495), and that his father's work was largely devoted to the growth of hardy trees which could survive in colder climates and would produce "some kind of fruit" (R. 1528–1529).

In rebuttal, government expert Mr. McCrory, who had been closely associated with Dr. Hansen and who is carrying on his work to some extent (R. 1947–1948), testified that Dr. Hansen's experiments were largely concerned with "winter hardiness" (R. 1950). He said that the term "dwarf" was sometimes misused in that it did not apply to plants simply because they were small in stature and that (R. 1955):

> * * * Dr. Hansen did talk with me frequently about that and we have some of those plants in our foundation planting that are

> smaller than others but we do not define it as dwarf with one exception. We have them that we are experimenting with, plants that are smaller and are grown that way by selection. You could term those dwarf, but that is an experiment, and they don't leave the station, you know.

Mr. McCrory further said that neither he nor "any one else" could predict the type or quality of a tree that would grow from a seed (R. 1955). He further said that Dr. Hansen told him that the development of his cherry bush took place over a period of 120 generations and required the growth of about 200,000 seedlings each generation (R. 1957). He stated that he visited Carl Hansen's nursery and noted only some evergreens and a few seedlings growing on it (R. 1956). He examined some of the fruit trees sold by petitioner and said that most of them were not grafted and were not of fruit bearing age, and that he could not predict the quality of fruit and height of the trees (R. 1958).

African violets. Petitioner advertised "Blaze Red" African violets and "African Violet Vine" (R. 122, 304, 473, 594, 668–669). Defense experts from whom petitioner purchased violets (R. 1172–1173) testified on cross-examination that (R. 1195), although there were African violets which were named "Red Lady", "Red King" etc., they knew of no African violet which bore a true red color. They said that they sold only the known varieties of African violets to petitioner, and that they did not sell him any "blaze red" African violets (R. 1185, 1198). They

said that they knew of no "African Violet Vine" (R. 1184, 1400, 1408, 1409; see also R. 1189); and that what petitioner advertised and sold as an "African Violet Vine" was in reality the "episcia coccinia", which was sold and invoiced to him and labeled as "episcia" (R. 1401, 1402, 1408, 1411; see also 1184). They stated that it was not common to call the "episcia" an "African Violet Vine" (R. 1408), but that it was called a "plant violet" (R. 1410–1411).

The purchasers of the advertised red African violet said that, after the plant bloomed, it was an ordinary orchid or blue colored African violet with some red in it, but was not a blaze red violet which they expected from the advertisement (R. 473–474, 593, 599).

Tulip trees. Petitioner advertised the sale of tulip trees from "three to five feet tall for successful" planting (R. 549, 648). Tulip trees which he sent in response to this advertisement were substantially less than three feet in height (see R. 549 where the trees were 10 inches and 19 inches; R. 649, where the trees were less than 2 feet; and R. 927, where the tree was about 25 inches, but the tip was broken off).

Petitioner's refund and replacement policy. Petitioner originally guaranteed satisfaction or money returned. Sometime after 1950, he usually required a return of the merchandise for a refund but he used both guarantees in his advertisements (R. 286, 186, 1836).

One of petitioner's employees testified that employee Lovelle was in charge of complaints from organizations and newspapers while she was in charge of customer complaints (R. 734–736). She said that

none of the business records were consulted in replying to the complaint, but an appropriate prepared mimeographed slip was used (R. 736–737). For example, when a person complained of the color, a slip was sent which would read "Due to the extreme low cost of the plant, we would not guarantee color" (R. 738). For a complaint about the dead condition of the plant, the slip sent would read that the plant was in a dormant condition and should be given more time to grow (R. 738). When asked when a refund would be made to a customer, she replied "That is a kind of long procedure" (R. 738), "might involve some time," "we might give a half credit", and that refunds would always be given when customers threatened to write to the Chamber of Commerce (R. 739). She could not recall refunds which were made where the merchandise was returned (R. 741), but she stated that some refunds and replacements were made (R. 753).[6] She said that no record of the complaints on her desk were made and usually the customer's correspondence was returned with the reply (R. 736, 737).

Petitioner's customers testified as to the treatment which they received when they complained about the products. Some received no satisfaction even after numerous requests where they did not return the necessary records, such as labels and previous correspondence (R. 273–274, 567, 571–572, 577, 661) or where they did not return the merchandise (R. 279,

[6] Employee Lovelle testified that they were told to "give the customer a refund or replacement, or whichever they preferred" and that they treated the customer the same regardless of how or through whom the complaint came to them (R. 1662, 1670).

307, 376–378, 426–427). Some customers just dropped the matter after getting no satisfactory response to their initial complaints (R. 363–364, 563, 569–572, 583–584, 590, 672–673). In one instance, the customer met all the requirements, but was finally told that the nursery had no record of his order (R. 186–189). Some customers received replacements (R. 594, 801) and others received one-half credit or refund (R. 108, 127, 202). Customers who testified that they actually received a refund were either those who made their complaints through the federal government, a lawyer or an organization such as a newspaper, or a Better Business Bureau (R. 147, 182, 218–219, 390, 467, 482, 488–489, 676), or those who received the refund after the indictment was returned (R. 302, 674–676). One customer testifying on petitioner's behalf said that she received a prompt refund in 1951 (R. 989).

Petitioner's assistant testified and introduced in evidence about 185,000 cancelled checks which he said were customer refunds totalling over $313,000 over a three year period. But it was noted on cross-examination that a spot check of the checks indicated that they were on the average for a $1.29 and could not have totalled $313,000 (R. 1820–1822, 1834–1835).

Petitioner's knowledge of his company's activities. As to the dwarf trees, petitioner testified that he purchased them from Carl Hansen who described them as dwarf trees, and "was convincing, by telling me about the work of his father and the system for dwarfing"; and that he never visited Hansen's place of business (R. 1849–1850). He professed complete ignorance

as to what the trees actually were and placed full responsibility on Carl Hansen and on his own employees (R. 1941). He said that he did not know until the trial that fruit trees seedlings did not produce the same fruits as the parent stock (R. 1942).

As to the red African violets, petitioner said that the term "red" has been used generally and commonly in connection with African violets, which were invoiced to him as "Red Head," "Red King," "Red Top," and that he felt that the public would know that the use of the phrase "Brilliant Blaze Red African Violet" in his advertisements would apply to the known classes of African violets (R. 1851–1852, 1920, 1922). He testified that he did not know much about African violets, and felt that his advertisement was not incorrect since the violets which he was selling had some red in them (R. 1923). He admitted, however, writing the National Better Business Bureau in 1952 complaining about other nurseries advertising yellow and red African violet seeds because it was "absolutely impossible to produce a yellow African Violet" (R. 1924–1925). The reply to his letter stated that "after checking with several authorities here, we are informed that there is no such thing as a true yellow or red African Violet" (R. 1925). Upon the receipt of the letter, he did not stop the advertising of the "Red African Violet."

As to the episcia which petitioner sold as "African violet vine," he stated that such a plant was closely related to the African violet, but that he had never seen the use of the word "African" in describing it.

He said that in later advertisements he described it as a "mock African violet vine" (R. 1853–1855).

Petitioner testified that his policy has always been to satisfy the customers and that his supervisors and employees were told to refund or replace, whichever the customer wished. In 1950 he adopted a policy of a 50% credit, particularly where the customer had kept the merchandise (R. 1847–1848). He added that he kept in "very close touch" with the complaint department, and that the volume of his mail order business prohibited him from keeping records of the complaints and that such practice was common with other mail order houses (R. 1859–1861, 1885). He further said that the complaints totalled only 6%, but later said that the 6% was based on the cash refunds and replacements actually made and not on the total volume of his business; he "assumes" that those who did not pursue their complaints did not because they were settled (R. 1880–1882). He indicated that where a customer did not receive satisfaction it was caused by an employee's mistake (R. 1884). He agreed that his advertisements "basically" guaranteed 100%, although in some advertisements and in his instructions with the shipments he advised the customer that a return of the merchandise was necessary (R. 1911–1915). He indicated full familiarity with the complaints received from the post offices, Better Business Bureaus, and state inspectors as to packaging, false advertisements, and inferiority of merchandise (R. 1894–1901, 1917, 1932; see also R. 824–834). But, for example, with respect to the com-

plaints which petitioner received from the California state inspector about mislabeling, inadequate packaging, and the sale of inferior merchandise, nothing was done about such practices and they continued (R. 825–835, 1894; see also R. 791–797, where other state inspectors notified petitioner about complaints, but petitioner did nothing to correct them).

The vice-president of the National Better Business Bureau testified for the defense that, whenever he called petitioner's attention to misadvertising, petitioner cooperated in changing the advertisements where the Business Bureau was "thoroughly right" in its position (R. 1272). This same witness said that petitioner treated his customers poorly as to his refund policy and he so notified petitioner (R. 1290).

Petitioner said that his experience as a nurseryman was limited, but that he was sole head of his business and that he himself bought practically all of his stock (R. 1891). He said that he discussed his advertisements several times daily with the advertising agency before they were printed (R. 1946; see also R. 744). Whenever criticisms of his advertisements were presented to him, he said that he attempted to correct them where he felt "that the criticism was warranted" (R. 1856). In an interview with Post Office Inspector Callahan on June 30, 1953, petitioner said (R. 930–931) that he personally checked the stock and worked on the advertisements.

ARGUMENT

Petitioner's attack on the sufficiency of the evidence presents no issue for further review by this Court.

As the trial court said in arriving at its verdict (R. 1992–1993):

> I can find no escape from a finding that the defendant was guilty of a fraudulent scheme and I think the circumstances throughout the volumes of evidence show that the public received unmerciful treatment on the part of these nurseries.
>
> * * * * *
>
> It is my opinion, Mr. FitzGerald [Defense Counsel], that the circumstances point unalterably to the conclusion that the Defendant had an unholy purpose in the course of the advertising that was conducted by him and by his agents and that the public in many respects, and I include in that the dwarfed tree and violet incidents, and perhaps from other circumstances, it seems to me there was a purpose to deceive the public and the mail has been used and I can find no way that I can reach any opinion or proper conclusion of the evidence here than the one of finding that the Defendant is guilty.
>
> * * * * *

Petitioner takes various matters in isolation and, relying principally on the testimony of defense witnesses, argues that there was no showing of fraud. It was of course the function of the trial court to judge the credibility of the testimony offered by petitioner as against that of the customer complainants and government experts. But even on petitioner's own showing the fraud is evident. As to the dwarf trees, petitioner centers his attack merely on the issue of whether naturally low-growing trees could prop-

erly be called dwarf, ignoring the fact that he also misrepresented the fruit bearing capacities and quality of his trees (see the Statement, *supra*, pp. 5, 6, 7, 9, 10). And petitioner's own testimony attests to his knowledge of his false advertisements on red African violets (see the Statement, *supra*, p. 14).

Petitioner attempts, as he did in the trial court, to absolve himself of guilt by arguing that he lacked knowledge of his company's misrepresentations and of the mistreatment of his customers. But this issue of knowledge and intent was decided by the court acting in place of the jury, and properly so in the light of petitioner's own testimony, other defense testimony, and the government testimony. This evidence shows unquestionably that petitioner, as the sole head of his company, was well-informed and well-experienced in his business, kept in close touch with its activities and with his advertising agents, and was fully aware of the nature of his advertisements and of the volume of complaints made about his business operations. In addition, his constant change of business names in dealing with the public (see the Statement, *supra*, pp. 3–4) cannot be explained in any rational way except as a means of avoiding responsibility for the complaints and of inducing dissatisfied customers to continue dealing with him (under the new name); in the circumstances of this case, this clearly indicates guilt.

Two courts have now held the evidence sufficient to show petitioner's guilt, and his present challenge brings forward nothing to call for this Court's departure from its settled rule of accepting concurrent

findings of fact. *Delaney* v. *United States*, 263 U. S. 586, 589–590; *United States* v. *Johnson*, 319 U. S. 503, 518.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1956.

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